

ASIC Corporations (ASIC Close Down Period) Instrument 2018/1034

Explanatory Statement

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (ASIC Close Down Period) Instrument 2018/1034 (*Instrument 2018/1034*) under subsections 601QA(1), 741(1) and 1020F(1) of the *Corporations Act 2001 (Act)*.

1. Purpose of the instrument

Lodgment of disclosure documents offering securities and Product Disclosure Statements

Subsection 727(1) of the Act requires that a person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 of the Act unless a disclosure document for the offer has been lodged with ASIC. Subsection 727(3) of the Act requires that a person must wait for a period of seven days after lodgment of a disclosure document (*exposure period*) before they accept an application for, or issue or transfer, non-quoted securities offered under that disclosure document. This period may be extended by ASIC by a further seven days to end no more than 14 days after lodgment.

Part 7.9 of the Act requires that some categories of financial product (typically managed investment products that can or will be traded on a financial market) may not be issued or sold in response to an application, unless the application form was given to the applicant together with a PDS. Subsection 1015B(1) of the Act requires that, in some cases, a copy of such a Product Disclosure Statement (*PDS*) must be lodged with ASIC before being given to a person for the purposes of Pt 7.9.

Where a PDS is lodged with ASIC, subsection 1016B(1) of the Act requires that a person must wait for a period of seven days after lodgement before issuing or selling a financial product to which the PDS relates, if the financial product is not able to be traded on a financial market (and so long as it is neither a managed investment product of an Australian passport fund nor a foreign passport fund product). This period may be extended by ASIC to end no more than 14 days after lodgment.

The exposure period in subsection 727(3)—and, by broad analogy, the period in section 1016B—is intended to provide ASIC and market participants with the opportunity to scrutinise disclosure documents and PDSs before they are used for fundraising or issue or sell financial products. For effective scrutiny to take place:

- (a) the market must be able to find out that the document has been lodged;
- (b) the document must be generally available to those likely to want to scrutinise it; and
- (c) there must be a reasonable period in which the document can be scrutinised.

Where a national public holiday falls within the first seven days of the exposure period, ASIC will extend the exposure period for as many days as there are national public holidays. This is consistent with the legislative intent that a document is exposed for at least five business days. ASIC will also extend the exposure period where we are not satisfied that the disclosure document has been made ‘generally available’ or where a disclosure document may be deficient. ASIC frequently extends the exposure period for one or more of these reasons when a disclosure document is lodged in the week prior to 25 December of every calendar year.

Furthermore, prior to the commencement of ASIC Corporations (Email Lodgment Service) Instrument 2018/0577 (*Instrument 2018/0577*), a person was not able to lodge a disclosure document offering securities during the period from 25 December to 1 January of the next calendar year (including those dates). At that time, because ASIC’s service centres closed during this period, persons could not comply with the requirement to lodge a hard copy of a disclosure document.

To reduce red tape, ASIC executed Instrument 2018/0577 on 29 June 2018, which approved the electronic lodgment of specified documents through ASIC’s Email Lodgment Service (including the electronic lodgment of disclosure documents) and provided for documents to be signed electronically. However, this had the consequence of allowing persons to lodge a disclosure document at any time from 25 December to 1 January. ASIC considers that both it and market participants will have insufficient opportunity to scrutinise a disclosure document effectively if it is lodged during this period. Accordingly, ASIC considers that this Instrument 2018/1034 operates to address practical consequences arising from ASIC’s own modification of the law under Instrument 2018/0577.

PDSs may be lodged with ASIC online in accordance with ASIC’s Electronic Lodgement Protocol. ASIC’s ability to effectively scrutinise such documents during the period from 25 December to 1 January each calendar year is limited by the closure of its offices during that period.

Instrument 2018/1034 omits the existing text of subsection 727(3) and section 1016B and substitutes new text so that, where a person lodges a disclosure document or PDS after the last business day before 18 December but before the first business day after 1 January of the next calendar year, the exposure period for an offer of non-quoted securities under s727(3), or for the issuance or sale of the financial products not able to be traded under s1016B, is set

at 14 days (without requiring ASIC to give written notice of any extension). The exposure period under each of subsection 727(3) and section 1016B is otherwise set at seven days (as is currently the case). ASIC retains its power to extend both exposure periods up to 14 days from lodgment.

ASIC intends to ameliorate the effect of the removal of the formal written notice stipulation in subsection 727(3) and section 1016B of the Act by responding to all persons lodging disclosure documents or PDSs during the period in which Instrument 2018/1034 applies an exposure period of 14 days, to provide lodging parties with a link to the instrument and an explanation as to its effect. ASIC also intends to publicise the instrument and its effect on its website and with various stakeholders in advance of the period each calendar year.

The effect of the declarations in relation to subsection 727(3) and section 1016B of the Act might appear to create offences for conduct that, but for the declarations, would not have constituted offences. However, the Act confers power on ASIC to extend the exposure period for a further seven days which, if extended, will result in a maximum exposure period being 14 days after lodgment. As the effect of the declarations in relation to subsection 727(3) and section 1016B of the Act do not create a maximum exposure period greater than 14 days after lodgment, ASIC does not consider the declarations to create new offences.

Lodgment of applications to register managed investment schemes

If a person lodges an application with ASIC for registration of a managed investment scheme (*scheme*) under section 601EA of the Act, subsection 601EB(1) requires that ASIC must register the scheme within 14 days of lodgment of the application (***registration period***), unless it appears to ASIC that various requirements have not been met as listed in paragraphs 601EB(1)(c) to (h).

When an application to register a scheme is lodged with ASIC, our assessment of the application may require us to seek clarification about the information in the application (or documents attached to it) and we may also request amendments to the documents and allow reasonable time for the responsible entity or its advisors to supply any information or make any required amendments to the documents.

ASIC's assessment of the application during the period from 25 December to 1 January each calendar year is limited by the closure of its offices during that period.

Instrument 2018/1034 omits the existing text of subsection 601EB(1) and substitutes new text so that, where a person lodges an application for registration of a managed investment scheme after the last business day before 11 December but before the first business day after 1 January of the next calendar year, the period within which ASIC must register a managed investment scheme is set at 21 days of lodgment of the application. The declaration ensures that if an application is lodged during this timeframe, the available time for assessment of the application is not impacted and, where necessary, allows the responsible entity or its advisers time to address any requests for clarification or provide documents minimising the risk of the scheme not being registered.

2. Consultation

ASIC did not conduct any public consultation on Instrument 2018/1034 because:

- (a) in relation to subsection 727(3) of the Act:
 - (i) it reflects and does not alter ASIC's current practice of frequently extending exposure periods for a disclosure document lodged in the week prior to 25 December of every calendar year for the reasons set out above;
 - (ii) it operates to address practical consequences arising from ASIC's own modification of the law under Instrument 2018/0577, which commenced on 29 June 2018; and
 - (iii) as persons have previously been unable to lodge a disclosure document between 25 December and 1 January, Instrument 2018/1034 will not frustrate any expectations they have of doing so;
- (b) in relation to section 1016B of the Act:
 - (i) in practice, PDSs are rarely lodged during this period. In the event that a PDS is lodged, the extension of the period in section 1016B reflects a consistent approach with the lodgement of disclosure documents referred to in paragraph (a) above; and
- (c) in relation to section 601EB of the Act:
 - (i) it is consistent with expectations that applications to register schemes would require an approximate timeframe of up to 10 business days (based on an assessment period of 14 calendar days under s601EB); and
 - (ii) Instrument 2018/1034 maintains this timeframe and ensures this assessment period is not significantly reduced due to the timing of lodgement of an application and ensures that all applications, regardless of when lodged, will be afforded the same assessment period.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

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This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The purpose of this legislative instrument is:

- (a) where the disclosure document or PDS is lodged with ASIC after the last business day before 18 December, but before the first business day after 1 January of the next calendar year:
 - (i) to set the exposure period in subsection 727(3) of the Act at 14 days (without requiring ASIC to give written notice of any extension), where non-quoted securities are offered under a disclosure document; and
 - (ii) to set the exposure period in section 1016B of the Act at 14 days (without requiring ASIC to give written notice of any extension), where certain financial products that are not able to be traded on a financial market are to be sold or issued in connection with a PDS lodged with ASIC; and
- (b) where the application for registration of a managed investment scheme is lodged with ASIC after the last business day before 11 December, but before the first business day after 1 January of the next calendar year, to set the period in section 601EB of the Act, within which ASIC must register the scheme, at 21 days.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.